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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 32000 (Sub-No. 12)

RIO GRANDE INDUSTRIES, INC., SPTC HOLDING, INC., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY
— CONTROL —
SOUTHERN PACIFIC TRANSPORTATION COMPANY
(Arbitration Review)

Decided: September 17, 2002

The Union Pacific Railroad Company (UP or the carrier)[1] has appealed an arbitration panel's award finding that certain former employees are eligible for labor protection benefits. By this decision, we are declining to review the award.

BACKGROUND

On August 25, 1988, the Board's predecessor agency, the Interstate Commerce Commission (ICC), approved the acquisition of control of the Southern Pacific Transportation Company (SP) by Rio Grande Industries, Inc., SPTC Holding, Inc., and the Denver and Rio Grande Western Railroad Company (DRGW).[2] The ICC's approval was conditioned on the standard New York Dock provisions for the protection of affected employees.[3] Under those conditions, employees who are adversely affected by changes related to approved transactions are entitled to receive comprehensive displacement and dismissal benefits for up to 6 years. Under Article IV of the New York Dock

[1] Petitioner refers to itself as the "Southern Pacific Transportation Company" (SP), because the events at issue occurred before SP and its affiliated rail carriers were absorbed into the Union Pacific Railroad Company. Because SP and its affiliated rail carriers no longer exist, we will refer to petitioner as "Union Pacific Railroad Company."

[2] Rio Grande Industries, Et Al.— Control—SPT Co., Et Al., 4 I.C.C.2d 834 (1988).

[3] See New York Dock Ry. — Control — Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979) (New York Dock), aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).

conditions, adversely affected employees who are not represented by a labor organization "shall be afforded substantially the same levels of protection as are afforded to members of labor organizations." If there is disagreement over application of, or eligibility under, the New York Dock conditions, the dispute may be taken to arbitration pursuant to Article I, section 11 of the New York Dock conditions, 360 I.C.C. at 87, subject to appeal to the Board under our deferential Lace Curtain standard of review.[4]

In their merger application before the ICC, applicants announced that, after the acquisition, DRGW's Management and Information Services (MIS) Department in Denver would be merged into the SP's MIS Department in San Francisco. Pursuant to an implementing agreement[5] negotiated under New York Dock with the Transportation • Communications International Union (TCU), the DRGW MIS employees represented by TCU were transferred to SP's MIS facility in San Francisco, along with the unrepresented members of that Department, in late 1989.

In 1992, the merged carrier's Chief Administrative Officer appointed a task force to study the outsourcing of MIS work. On March 22, 1993, the Southern Pacific Empowered Employees Committee (SPEEC), describing itself as a voluntary organization representing nonunion MIS employees, was formed. SPEEC attempted to secure New York Dock benefits for its members, arguing that the outsourcing was the result of the merger between DRGW and the SP. The carrier took the position that the employees represented by SPEEC were not entitled to benefits under New York Dock.

In November 1993, the merged DRGW/SP contracted for MIS services with Integrated Systems Solutions Corporation (ISSC), a subsidiary of International Business Machines. Many persons working in the MIS Department obtained jobs with ISSC. Some who did not, or who could not obtain other employment with the carrier, accepted a severance package containing a release from additional compensation. The jobs of all MIS Department workers were terminated in late 1993.

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[4] The standards for the Board's review are set forth in Chicago & North Western Tptn. Co. — Abandonment, 3 I.C.C.2d 729 (1987), aff'd sub nom. IBEW v. ICC, 826 F.2d 330 (D.C. Cir. 1988), known as the Lace Curtain case. These standards are codified at 49 CFR 1115.8.

[5] Under New York Dock, changes that affect rail employees and that relate to transactions approved by us must be implemented by agreements negotiated, or imposed by an arbitrator, before the changes occur.

On December 9, 1993, SPEEC, stating that it represented about 310 nonunion MIS personnel (hereafter, claimants), and specified individuals appearing in their own names,[6] took their claims for protective benefits to arbitration under New York Dock. The parties selected a panel (the Panel) chaired by neutral member William E. Fredenberger, Jr. (herein, the Arbitrator or Fredenberger). For reasons not stated in the record before us, the record in the arbitration did not close until some time in 1998.[7]

The Panel issued an award on March 20, 2000. The Panel found in favor of claimants, except for those who had signed a waiver of claims in the severance agreement. The Panel issued an "Interim Award" resolving only issues that were common to all of the claimants, leaving the carrier and the individual affected claimants to negotiate over issues that are unique to each individual claim. In its ruling, the Panel: (1) rejected the carrier's argument that the claimants could not pursue their arguments because SPEEC lacked standing to represent them (herein, the standing issue); (2) found that the carrier's outsourcing of MIS work was causally related to the DRGW/SP consolidation (herein, the causation issue);[8] and (3) rejected the carrier's argument that MIS personnel were not eligible for New York Dock benefits because they were managers (herein, the employment-status issue).

On May 10, 2000, after an extension granted by the Board, the carrier filed an appeal of the Panel's award, challenging the Panel's findings on each of the three issues mentioned above. The

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[6] The Panel's Award (at 5) states that SPEEC was joined by "specified individuals," but the names of these individuals are not provided.

[7] In 1994, ISSC's contract employee force was reduced by about one half. On August 6, 1996, we approved the acquisition of DRGW/SP by UP. Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (1966), aff'd sub nom. Western Coal Traffic League v. STB, 169 F. 3d 775 (D.C. Cir. 1999). In September 1998, UP canceled the contract with ISSC and brought the MIS function in-house, to be performed in Omaha and St. Louis. The remaining former DRGW/SP MIS employees employed by ISSC either continued to work for ISSC on other projects or left that company for other employment.

[8] The Panel and the parties discussed this as two separate issues: (1) whether the outsourcing was a transaction to which the New York Dock conditions applied; and (2) whether the outsourcing was causally related to the DRGW/SP consolidation. We view these as only one issue, i.e., whether the outsourcing was part of, or causally related to, a New York Dock-approved transaction, the DRGW/SP consolidation.

carrier simultaneously filed a motion for stay,[9] a motion for oral argument, and a motion to exceed page limits. On June 23, 2000, after having received an extension, SPEEC filed a reply in opposition to the carrier's appeal.

By decision served on August 29, 2000, we granted UP's motion requesting that we delay action on its appeal to allow it to pursue reopening of the arbitration, alleging receipt of new evidence. In particular, the carrier asserted that Charles E. Lamb, a witness whose testimony supported the claimants' position on the causation issue, had recanted his prior statement.

Subsequently, the carrier submitted a letter to the Arbitrator asking him to withdraw the award and to convene a new evidentiary hearing where Lamb could testify. On November 30, 2000, a new hearing was held before the Arbitrator. Testifying at the hearing were Lamb and a SPEEC witness appearing for the first time, Robert S. Bogason. On February 10, 2001, the Arbitrator issued a decision affirming the Panel's March 20, 2000 award in favor of claimants.[10]

On May 15, 2001, UP filed its opening brief addressing issues raised by the Arbitrator's February 10, 2001 decision and renewing its objections to the March 20, 2000 award favoring claimants. On June 1, 2001, SPEEC filed its opening brief and a separate motion to allow its brief to be filed late. On June 14, 2001, both parties filed reply briefs.

PRELIMINARY ISSUES

Oral Argument. We will deny the carrier's motion for oral argument. UP has not justified its request that we deviate from our normal practice of deciding most cases on a written record. UP has not shown that it is unable to present its arguments in written form, and the record before us shows that it has been able to do so.

Page Limits. The carrier has filed separate motions to exceed the 30-page limit of 49 CFR 1115.2(d) for its appeal and its brief. We will grant both motions. No objection has been raised to UP's request and granting it will not unreasonably burden the record in this case.

Late Filing of Brief. We will grant SPEEC's unopposed motion that we accept its late- filed opening brief. SPEEC has shown that its brief was filed late due to circumstances beyond its control.

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[9] Stay was denied by decision served on July 5, 2000.

[10] The Arbitrator's decision is attached to the Carrier's Status Report filed on February 21, 2001. The decision also appears in Exhibit 1 of SPEEC's opening brief.

Fredenberger Conviction. We will deny UP's request to vacate the award due to the Arbitrator's conviction on a charge of evading Federal taxes.[11] We have refused to vacate other awards issued by Fredenberger on that ground, stating that, "we are aware of no authority for the proposition that legal or ethical transgressions, even by public employees, invalidate decisions by the transgressing employees that have no relationship to the issues or subject matter involved in the transgression." Norfolk Southern Corporation – Control – Norfolk and Western Railway Company and Southern Railway Company, STB Finance Docket No. 29430 (Sub-No. 21) (STB served Dec. 15, 1999), at 3 (Norfolk Southern).[12] The same reasoning applies here. The subject matter of Fredenberger's conviction (tax evasion) had nothing to do with the subject matter of the arbitration. In Norfolk Southern, we also refused to vacate the award on the alternative ground that the parties did not raise the issue of his qualifications before the Panel in that proceeding. Here, likewise, there is evidence that the parties knew of Fredenberger's conviction but decided to pursue arbitration anyway without objecting to his presence on the Panel.[13]

Nor is there any merit to the carrier's attempt to distinguish Norfolk Southern on the grounds that the award here was issued after Fredenberger was removed from the National Mediation Board's roster of arbitrators as a result of his conviction. While Fredenberger's removal from the roster would have precluded him from representing that he was a National Mediation Board arbitrator after his removal, his removal did not automatically disqualify him from serving on the Panel. As in Norfolk Southern, the selection of Fredenberger was a matter of private agreement between the parties.[14] UP has not disputed that both parties were advised of the conviction, and both parties chose to continue the arbitration with full knowledge of that fact.[15]

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[11] See the carrier's appeal, at 7 n.3.

[12] Accord, CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company – Control and Operating Leases/Agreements – Conrail, Inc. and Consolidated Rail Corporation (Arbitration Review), STB Finance Docket No. 33388 (Sub-No. 92) (STB served Jan. 26, 2001).

[13] Reply of SPEEC, filed on June 23, 2000, at 15-16.

[14] Id.

[15] Id.

DISCUSSION AND CONCLUSIONS

Standard of Review. Under the Lace Curtain standard, we limit our review of arbitrators' decisions to "recurring or otherwise significant issues of general importance regarding the interpretation of our labor protective conditions." 3 I.C.C.2d at 736. We do not review issues of causation, the calculation of benefits, or the resolution of other factual questions in the absence of egregious error. Id.

Given that standard of review, we decline to review the Fredenberger Panel's award. Contrary to what the carrier maintains, the employees represented by SPEEC have standing to pursue arbitration under New York Dock and to use SPEEC as a means for their pursuit of arbitration. In addition, the carrier's objections to the Panel's findings on the issues of causation and employment status do not demonstrate egregious error as required by Lace Curtain.

Standing. The carrier challenges both (1) the standing of the claimants to pursue arbitration in their own right (without the joinder or consent of a union) and (2) the standing of SPEEC to act on their behalf. The carrier maintains that, even if the Panel were correct in finding that the 310 claimants were non-managerial New York Dock-covered "employees," they lacked standing to pursue arbitration because they were under the potential bargaining jurisdiction of TCU. But under New York Dock, even if an individual employee is an actual member of a union (not merely eligible for unionization), the employee has standing to pursue arbitration under New York Dock without the joinder or consent of his or her union. 360 I.C.C. at 87; Norfolk and W. Ry. Co. and New York, C. & St. L. R. Co. Merger, 5 I.C.C.2d 234 (1989). This authority applies a fortiori to persons who, like the MIS claimants, were not represented by a union. In any event, no union has appeared in this proceeding to assert that SPEEC's attempt to obtain New York Dock benefits for claimants has intruded upon its lawful functions. Thus, we reject the carrier's argument that claimants lack standing to pursue arbitration as individuals in their own right.

We also reject the carrier's challenge to SPEEC's standing to represent claimants. It has never been held that, when employees pursue arbitration, each individual employee must appear separately rather than participate jointly with other employees via an informal, ad hoc entity like SPEEC. By focusing on the fact that SPEEC is not a collective bargaining entity, the carrier confuses (a) standing to raise issues that are rightfully raised only by unions, in areas such as collective bargaining (not at issue here), and (b) standing to pursue claims for benefits under New York Dock (the issue here). SPEEC is not involved in collective bargaining or other activities performed by unions and does not claim to have standing for these purposes. SPEEC is nothing more than an informal group of individual employees who banded together for the sole purpose of retaining counsel to arbitrate common issues in their pursuit of New York Dock benefits, a purpose that has never been held to be improper.

The carrier also challenges SPEEC's standing by questioning whether SPEEC truly represents the employees that it purports to represent. However, the Panel upheld the representative nature of SPEEC, and this factual finding is entitled to deference under Lace Curtain, in the absence of egregious error. The carrier did not show such error, citing no evidence that SPEEC was a fraudulent group or that any one of the 310 former MIS claimants does not wish to have SPEEC argue common issues shared with the other claimants.

Causation. The Panel found that the 1993 outsourcing of the MIS workers was linked to, or caused by, the 1988 consolidation. The Panel's causation finding reflects a conclusion that the carrier impliedly admitted the causal link by including reference to the MIS outsourcing in a 1992 New York Dock notice and subsequent agreement that was intended to implement the reassignment of "at least 850 clerical employees" pursuant to the 1988 consolidation.[16]

UP does not dispute that the 1992 notice and agreement was intended to implement the reassignment of "clerical" employee classes described therein as a result of the 1988 consolidation. The carrier, however, argues that the Panel, in finding that the claimant MIS employees were covered under the 1992 notice and agreement, erred egregiously by relying on Witness Lamb's statement.

As noted above, under the Lace Curtain standard, we do not review issues of causation or other factual questions in the absence of egregious error. The Panel found that Witness Lamb's testimony about the carrier's meaning and intent of the 1992 notice and agreement was more credible than the testimony of a carrier witness, Thomas Matthews, who stated that the outsourcing was an efficiency-enhancing action that would have been taken even in the absence of the 1988 consolidation.[17] The carrier argues that the statement of Witness Matthews is more credible. In declining to review the Panel's causation finding, we are not finding that no reasonable decision maker could accept Matthews' explanation for the outsourcing. However, the fact that a reasonable decision maker might accept Matthews' explanation for the outsourcing is insufficient to establish egregious error. There was nothing in the way the Panel weighed the conflicting views of Witnesses Lamb and

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[16] The 1992 implementing agreement appears in Exhibit D of the carrier's Index of Exhibits filed on May 15, 2001. The actual notice announcing the carrier's intent to reassign the clerical employees was not included in the record before the Board, but a letter to clerical supervisors describing the contents of the notice was attached to the initial statement of Charles E. Lamb, who during the relevant period served as SP's Director--Labor Relations for non-operating personnel. Witness Lamb's statement appears in Exhibit A of the carrier's Index of Exhibits filed on May 15, 2001. It is also reproduced in Exhibit Tab 10 of the carrier's appeal filed on May 10, 2000.

[17] Witness Matthews' statement is reproduced in Exhibit Tab 5 of the carrier's appeal filed on May 10, 2000.

Matthews that would justify a finding that a reasonable decision maker could not have accepted the testimony of Lamb rather than that of Matthews.

The carrier notes that Witness Lamb changed his testimony at the hearing on November 30, 2000, but that does not deprive the Panel's finding on causation of any rational basis. In fact, the Arbitrator found Lamb's initial testimony more believable than his later testimony.[18] Part of the deference traditionally accorded to fact finders like New York Dock arbitration panels is the deference they receive when issues of credibility are raised. Here, the Arbitrator witnessed Lamb's testimony at the November 30 hearing; we did not. Thus, this dispute squarely turns on the issue of witness credibility, a determination particularly within the Arbitrator's competence. To substitute our judgment for his would undermine our Lace Curtain line of precedent.[19]

Employment Status. The issue of employment status is also the type of factual issue to which we defer to arbitrators in the absence of egregious error. UP has not demonstrated that the Panel erred egregiously in finding that claimants were eligible for New York Dock benefits because they were

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[18] February 10, 2001 Decision at 11:

> Thus, the state of the evidentiary record remains essentially unchanged insofar as it relates to the findings of the Interim Award. Lamb's original Declaration has been credited over his second Declaration and testimony at the [November 30, 2000] hearing conflicting with the first Declaration.

[19] The Arbitrator found that Lamb's original testimony was supported by the testimony of Bogason regarding UP's policy of issuing New York Dock notices that had broad scope. The carrier argues that the neutral Panel member should have excluded Bogason's November 30, 2000 testimony under the attorney-client privilege because he had worked as an attorney for the railroad.

That privilege applies to confidential communications between attorney and client. The purpose of the privilege is to preserve the confidential relationship between them. Here, Witness Bogason's testimony was based on public statements of corporate policy or policy that was broadly known within the organization, as distinguished from policy that was intended to remain confidential. See November 30, 2000 hearing, Tr. 166-196. Bogason himself stated that he would be testifying only as to policies that were stated by the company in public documents. Thus, the arbitrator did not err in declining to exclude Witness Bogason's testimony.

UP's attempt to discredit Bogason's testimony as that of a disgruntled employee goes more to the weight of this evidence than its admissibility. The weight to be accorded the testimony of a witness lies within the purview of the Arbitrator. We see nothing in this record to cause us to find that the Arbitrator's reliance on Bogason's testimony was unreasonable.

employees rather than management. The Panel cited abundant evidence in support of its finding,[20] and, consistent with our Lace Curtain standard of review, we will not re-weigh the evidence and reach a decision on employment status as if we were resolving the issue anew.

The carrier argues that claimants were managerial personnel on the grounds that they had transferrable skills, citing a case where skill transferability was considered to be a relevant factor to consider in determining whether personnel are managerial.[21] But there the transferability of skills was one relevant factor, to be considered along with other factors. UP presented no authority for the proposition that personnel with transferrable skills are automatically presumed to be ineligible for New York Dock benefits.[22] In any event, the Panel cited testimony that claimants' skills were not transferrable, and this was sufficient to rebut UP's allegation of egregious error.[23]

Moreover, the Panel's finding is consistent with the fact that railroads seldom contract out positions that are truly managerial, as it would cause them to lose control over their business. Thus, if claimants had been truly exercising managerial functions, they most likely would not have been contracted out.

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[20] The Panel's conclusion that claimants did not perform managerial functions was bolstered by Witness Lamb's detailed description, at the November 30, 2000 hearing, of the work actually performed by claimants. Attempting to distinguish claimants from TCU-represented data entry clerks working "in the field," Lamb stated (Tr. 124):

> The people at MIS, the people that we're talking about, the three hundred people you're talking about, their jobs were to write the programs, maintain the programs, and modify the programs such that the workers in the field could perform their duties, and these are the people in the field that were performing these duties.

Lamb described claimants as highly specialized, professional computer programmers, who designed and modified programs to further the tasks of other employees, and thus did not exercise the broad policy and operational supervision that is commonly understood to characterize management.

[21] Newbourne v. Grand Trunk Western Railroad Company, 758 F.2d 193 (6th Cir. 1985).

[22] Railroads employ many persons such as electricians, mechanics, and word processors who have transferrable skills and can hardly be considered to be management.

[23] See the statement of Michael Markovitch, Exhibit Tab 7 of the carrier's appeal filed on May 10, 2000, at 3.

Conclusion. In sum, UP has failed to make the requisite showing under our Lace Curtain standards to warrant our review of this arbitral award.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. UP's motion for oral argument is denied.

2. UP's motions to exceed the 30-page limit are granted.

3. SPEEC's motion for acceptance of its late-filed opening brief is granted.

4. UP's request that we vacate the award due to Arbitrator Fredenberger's conviction is denied.

5. UP's request that we review the award on its merits is denied.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams
Secretary